IN THE SUPREME COURT OF THE STATE OF NEVADA

ANTHONY CLARKE, Appellant, vs. THE STATE OF NEVADA, Respondent.	No. 80130 Dist. Court No. CR19-1352

Appeal from a Guilty Plea
Second Judicial District Court, Washoe County
Honorable David Hardy, District Court Judge

APPELLANT'S OPENING BRIEF

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NRAP 26.1 DISCLOSURE

The undersigned certifies that Anthony Clarke is the true name of a natural person, and that no corporation is involved in this litigation. The undersigned further certifies that the only other attorney who has represented Anthony Clarke in this appeal is Carolyn Tanner of Tanner Law & Strategy Group.

/s/ Tracie K. Lindeman
Attorney for Appellant

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STATEMENT OF JURISDICTION

This is an appeal from a judgment of conviction, pursuant to a guilty plea, of one count of burglary. JA 163-64. The judgment of conviction was entered on November 25, 2019. *Id*. Appellant, Anthony Clarke, timely filed a notice of appeal from that judgment on December 4, 2019. JA 165-66. This court's jurisdiction rests on Rule 4(b) of the Nevada Rules of Appellate Procedure (NRAP) and NRS 177.015(3) (providing that a defendant may appeal from a final judgment in a criminal case).

ROUTING STATEMENT

This appeal is presumptively assigned to the Nevada Court of Appeals because it involves a conviction based on a guilty plea. NRAP 17(b)(1).

STATEMENT OF THE LEGAL ISSUES PRESENTED

I. Whether the district court erred by denying appellant's request to reinstate counsel at the sentencing hearing.

II. Whether the district court erred by denying appellant's pre-sentencing motion to withdraw his guilty plea.

III. Whether appellant's sentence should be reviewed in light of amendments to NRS 205.060.

IV. Whether the district court abused its discretion at sentencing.

STATEMENT OF THE CASE

Mr. Clarke was charged, by way of information, with 1 count of burglary. JA 001. Mr. Clarke entered a plea of guilty pursuant to a guilty plea agreement, wherein the State agreed to stipulate to a recommended prison term of 12 to 36 months. JA 004-009. Prior to sentencing, Mr. Clarke requested that he be allowed to represent himself, and the district court granted the motion, with the provision that Mr. Clarke's counsel (the Washoe County Public Defender's Office) be appointed to serve as standby counsel. JA 082-86.

Mr. Clarke also filed a pro se motion to withdraw his guilty plea prior to sentencing. JA 097-100. The motion was opposed by the State and was denied by the district court. JA 128-31.

At the sentencing hearing, Mr. Clarke requested that counsel be reappointed, and the district court summarily denied the request. JA 149-50. The district court the proceeded to sentence Mr. Clarke to a term of 28 to 96 months. JA 163-64.

STATEMENT OF THE FACTS

The facts of the crime to which Mr. Clarke pleaded guilty are as follows. On March 2, 2019, Mr. Clarke entered the Taste of Chicago restaurant located in Reno, Nevada. JA 016. Mr. Clarke took approximately $35.00 out of the employee tip jar and left the restaurant. *See also Presentence Investigation*

Report (PSI), at page 11 (Offense Synopsis).[1] The owner of Taste of Chicago and one of the customers followed Mr. Clarke out of the restaurant and recovered the money, after which Mr. Clarke was arrested. JA 158.

LEGAL ARGUMENT

The district court erred in several important respects in this matter. Those errors are laid out more fully below, but it is clear when considering the circumstances as a whole, that justice demands that the judgment of conviction be reversed and this matter remanded to the district court. Mr. Clarke was deprived of his right to counsel at sentencing, reversible error in and of itself. This error was compounded by the district court's refusal to allow him to withdraw his guilty plea and must be considered in light of the fact that the sentence he received is no longer applicable to the crime to which he pleaded guilty.

I. WHETHER THE DISTRICT COURT ERRED BY DENYING APPELLANT'S REQUEST TO REINSTATE COUNSEL AT THE SENTENCING HEARING.

The most egregious error committed by the district court was to summarily deny Mr. Clarke's request to reinstate his counsel at sentencing.

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[1]The PSI is a confidential document. By separate motion, Mr. Clarke is asking this court to direct the Clerk of the Second Judicial District Court to transmit it for inclusion in this appeal.

> THE DEFENDANT: I'd like to invoke my right to counsel, Ms. Valencia.
>
> THE COURT: No. We're past that.
>
> THE DEFENDANT: Okay.
>
> THE COURT: We've gone past that. And when I had the Faretta canvass, I was very clear. You may proceed on your own behalf as you requested.
>
> THE DEFENDANT: Okay. On page ten it says that I was arrested for following --
>
> THE COURT: Ms. Northington -- excuse me, sir -- Ms. Northington, are you aware of any authority which would compel me to reconstitute counsel simply upon his request?
>
> MS. NORTHINGTON: No, your Honor.
>
> THE COURT: Thank you. I should note that I believe that there is some either uninformed choices that we examined during the Faretta canvass or there's intentional gamesmanship, one of the two, and based upon the entirety of this record, his request for counsel at the moment of his sentencing will be denied.
>
> MS. NORTHINGTON: Your Honor, if I may, I do remember at the Faretta canvass that occurred on October 23rd, and I believe you specifically indicated to him that should this matter proceed to sentencing today he would be proceeding in proper person and he acknowledged that at that time.

JA 149-50.

As can be seen, the district court refused to allow Mr. Clarke to explain the reasons for his request. Rather, the extent of the district court's reasoning was that Mr. Clarke had previously waived his right to counsel, and the

district court was not compelled to reconstitute counsel "simply upon [Mr. Clarke's] request." This is a misstatement of the law and reversible error.

As an initial matter, there is no question that a defendant has the right to counsel at sentencing.

> Though the right to counsel was originally a trial right, the Supreme Court has extended the right to various "critical" stages of the prosecution and has held that sentencing is one such "critical" stage. *See Gardner*, 430 U.S. at 358; *Mempa v. Rhay*, 389 U.S. 128, 134-37, 19 L. Ed. 2d 336, 88 S. Ct. 254 (1967).

Robinson v. Ignacio, 360 F.3d 1044, 1056 (9th Cir. 2004).

The mere fact that Mr. Clarke had previously waived his right to counsel does not provide a sufficient reason to refuse a subsequent request to reinstate counsel, as noted by the *Robinson* court.

> [I]t is clearly established federal law that the right to counsel may be re-asserted during sentencing, and a trial court cannot deny a defendant's timely request for representation without a sufficient reason. The state trial court, however, had no such reason; instead, it denied Robinson's request based primarily on the discredited idea that once waived, the right to counsel cannot be re-asserted at sentencing.

Id.

As noted previously, the district court in this case did not provide a reason for denying Mr. Clarke's request for counsel beyond the fact that Mr. Clarke had previously waive the right to counsel.

"[I]n the absence of extraordinary circumstances, an accused who requests an attorney [post-trial] is entitled to have one appointed, unless the

government can show that the request is made for a bad faith purpose." *Menefield v. Borg*, 881 F.2d 696, 701 (9th Cir. 1989). Mr. Clarke was entitled to have counsel reappointed. The district court's ruling was so hurried that the State did not even have a full opportunity to weigh in on the request, much less show that it was made for a bad faith purpose. The extent of the State's opposition was to opine that there was no authority that required the appointment of counsel upon the defendant's request, and to note that Mr. Clarke had previously waived his right to counsel after a *Faretta* canvass.

There was, therefore, no valid reason given to deny the request, much less any extraordinary circumstances or the demonstration of a bad faith purpose for the request.

Moreover, granting Mr. Clarke's request would not have been likely to result in a substantial delay in the proceedings. Standby counsel (who had previously assisted Mr. Clarke and was therefore familiar with the case) was standing next to Mr. Clarke in the courtroom and could have quickly assumed her duties. The sentencing hearing was not a lengthy procedure, and even if a brief continuance had been required, "[r]escheduling such a hearing -- more likely than not – [would] not involve[d] a significant disruption of court scheduling." *Menefield*, 881 F.2d at 701.

Finally, the deprivation of counsel at sentencing is constitutional error that is not subject to a harmless error analysis.

> Thus, whenever a defendant is denied counsel during sentencing, the Supreme Court has uniformly found constitutional error without any showing of prejudice. *See Cronic*, 466 U.S. at 659. *See also Chapman v. California*, 386 U.S. 18, 23, 17 L. Ed. 2d 705, 87 S. Ct. 824 & n.8, 386 U.S. 18, 17 L. Ed. 2d 705, 87 S. Ct. 824 (1967) (recognizing that the right to counsel is "so basic to a fair trial that [its] infraction can never be treated as harmless error").

Robinson, 360 F.3d at 1056.

The record must be reviewed in light of "the U.S. Supreme Court's mandate that we 'indulge in every reasonable presumption against waiver' of the right to counsel." *Hooks v. State*, 124 Nev. 48, 57, 176 P.3d 1081, 1086 (2008). Mr. Clarke acknowledges that this court has previously upheld the denial of a request for counsel on the day of sentencing, in *Arajakis v. State*, 108 Nev. 976, 982, 843 P.2d 800, 804 (1992). The case at bar is distinguishable from *Arajakis*, however, because the defendant in *Arajakis* waited a month and a half after trial and then sought a continuance of sentencing so that he could obtain counsel. Here, as previously noted, standby counsel was literally standing by, and any delay in the proceedings would have been brief.

In sum, there has been no showing, indeed no allegation even, that Mr. Clarke's request for the reappointment of his counsel at sentencing was made in

bad faith, for an improper purpose, or for the purpose of delay. It was, therefore, reversible error for the district court to deny the request.

II. WHETHER THE DISTRICT COURT ERRED BY DENYING APPELLANT'S PRE-SENTENCING MOTION TO WITHDRAW HIS GUILTY PLEA.

"Except as otherwise provided in this section, a motion to withdraw a plea of guilty, guilty but mentally ill or nolo contendere may be made only before sentence is imposed or imposition of sentence is suspended." NRS 176.165.

"[W]hen a defendant brings a motion to withdraw a guilty plea, the trial court has a duty to review the entire record to determine whether the plea was valid. A district court may not simply review the plea canvass in a vacuum, conclude that it indicates that the defendant understood what []he was doing, and use that conclusion as the sole basis for denying a motion to withdraw a guilty plea." *Mitchell v. State*, 109 Nev. 137, 140-41, 848 P.2d 1060, 1061-62 (1993). Rather, "the district court must consider the totality of the circumstances to determine whether permitting withdrawal of a guilty plea before sentencing would be fair and just." *Stevenson v. State*, 131 Nev. 598, 603, 354 P.3d 1277, 1281 (2015)

In his motion to withdraw his guilty plea, Mr. Clarke asserted that he was given conflicting information as to whether a lineup would be conducted, whether a lineup had been conducted and what impact this should have on his decision to enter a guilty plea. JA 097-99. The district court noted that there were

logical inconsistencies in Mr. Clarke's argument, and that Mr. Clarke had been represented by different public defenders when he waived his preliminary hearing and when he entered his guilty plea. JA 131. It is obvious from the record that Mr. Clarke was confused about the proceedings. Given that his motion was made prior to sentencing there would have been no prejudice to the State had the district court allowed Mr. Clarke to withdraw his plea. Accordingly, the district court should have granted the motion. *Mitchell*, 109 Nev. at 141, 848 P.2d at 1062 (holding that the appellant presented a fair and just reason to withdraw her plea where, *inter alia*, the State would not be prejudiced, and only a minor amount of money was involved).

III. WHETHER APPELLANT'S SENTENCE SHOULD BE REVIEWED IN LIGHT OF AMENDMENTS TO NRS 205.060.

Prior to the amendment of the statute in 2019, Nevada had an undifferentiated burglary statute. At that time, NRS 205.060(1) read:

> Except as otherwise provided in subsection 5, a person who, by day or night, unlawfully enters or unlawfully remains in any house, room, apartment, tenement, shop, warehouse, store, mill, barn, stable, outhouse or other building, tent, vessel, vehicle, vehicle trailer, semitrailer or house trailer, airplane, glider, boat or railroad car, with the intent to commit grand or petit larceny, assault or battery on any person or any felony, or to obtain money or property by false pretenses, is guilty of burglary.

2019 Nev. Stat. ch. 633, § 55, at 4425.

Under the previous statute, an individual convicted of burglary, regardless of whether it was of a home, a business, or even a vehicle was "guilty of a category B felony and shall be punished by imprisonment in the state prison for a minimum term of not less than 1 year and a maximum term of not more than 10 years, and may be further punished by a fine of not more than $10,000." 2019 Nev. Stat. ch. 633, § 55 at 4425-26.

At the hearings on the amendments to NRS 205.060, Justice James Hardesty noted that the statute rendered Nevada "a big-time outlier in our approach to burglary," when compared with other states. May 31, 2019, Senate Comm. on Judiciary, p. 10.

Additionally, NRS 205.060(5) provided: "The crime of burglary does not include the act of entering a commercial establishment during business hours with the intent to commit petit larceny unless the person has previously been convicted: (a) Two or more times for committing petit larceny within the immediately preceding 7 years; or (b) Of a felony." 2019 Nev. Stat. ch. 633, § 55, at 4426. This provision appears to be an acknowledgement of the harshness of convicting an individual of a category B felony for entering a business for the purpose of committing petit larceny. This reading is supported by the fact that this provision was removed when the statute was amended to provide differentiated levels of punishment depending on the type of structure.

During the hearing on AB 236, which, in part, amended the burglary statutes, Justice James Hardesty noted that burglary was "the number one offense at admission to prison." March 8, 2019, Assembly Comm. on the Judiciary, p.10. Further, in looking at the burglaries that had been committed by those in prison, "63 percent did not involve a residence and 70 percent did not involve any victim." *Id.* This finding was the basis for the recommended amendment that distinguished between burglary of a motor vehicle, a commercial building, another type of building, a residence, and a home invasion.

The Nevada legislature ultimately amended NRS 205.060, adopting a differentiated burglary statute. Under the current statute, an individual convicted of entering a business with the intent to commit petit larceny, is guilty of only a category C felony, and subject to "imprisonment in the state prison for a minimum term of not less than 1 year and a maximum term of not more than 5 years." NRS 193.130. The amendment took effect on July 1, 2020.

Mr. Clarke concedes that he was convicted under the previous statute, having pleaded guilty to an offense that was committed on March 2, 2019. The general rule is that "unless the Legislature clearly expresses its intent to apply a law retroactively, Nevada law requires the application of the law in effect at the time of the commission of a crime." *State v. Second Judicial Dist. Court of Nev.*, 124 Nev. 564, 567, 188 P.3d 1079, 1081 (2008). Nonetheless, Mr. Clarke submits

that the amendments made to the burglary statute and the concerns addressed by those amendments militate for a reversal in this particular case.

Here, the State agreed to recommend a prison term of 12 to 36 months, a term that is within the parameters of a category C felony. At sentencing, the prosecutor stated that the case "was negotiated due to the facts of the case. It was $35. The $35 was returned to the victim that night." JA 156. The district court's departure from that recommendation is extreme, albeit within the statutory range in effect at the time.

The district judge expressed grave concerns based on his misunderstanding of the record, specifically that "the $35 was returned, but it was returned after the [victim] had chased him and tackled him and there was some person-to-person contact." JA 157. There does not appear to be any evidence in the record to support the district judge's characterization of the events, wherein he speculated that there had been some sort of affray. Rather, the record supports Mr. Clarke's statement at sentencing that when he was confronted by the victim and another witness, he returned the money. JA 157-58. Although Mr. Clarke did his best to argue his case at sentencing, he was at an unfair advantage because he had been deprived of his right to counsel.

Given that Mr. Clarke returned the money taken from the tip jar when confronted, and the amount was minimal in any event, the sentence imposed by the

district court of 28 to 96 months is a perfect example of the problems implicit in an undifferentiated burglary statutory scheme. The unfairness of the sentence imposed in light of the amendments made to the statute weighs in favor of reversing and remanding this matter, particularly when coupled with the deprivation of counsel which occurred at sentencing.

IV. WHETHER THE DISTRICT COURT ABUSED ITS DISCRETION AT SENTENCING.

A defendant's challenge of a sentence will be reviewed for an abuse of discretion on appeal. *Randell v. State*, 109 Nev. 5, 8, 846 P.2d 278, 280 (1993). This court may intervene regarding the sentencing decision if the defendant shows prejudice resulting from consideration of information or accusations founded on facts supported by impalpable or highly suspect evidence. *Silks v. State*, 92 Nev. 91, 94, 545 P.2d 1159, 1161 (1976). An abuse of discretion can also occur where "the district court's decision . . . exceeds the bounds of law or reason," *Crawford v. State*, 121 Nev. 744, 748, 121 P.3d 582, 585 (2005) (footnote omitted) (*quoting Jackson v. State*, 117 Nev. 116, 120, 17 P.3d 998, 1000 (2001), or "fails to give due consideration to the issues at hand." *Patterson v. State*, 129 Nev. 168, 176, 298 P.3d 433, 439 (2013) (citations omitted).

In the instant case, it appears that the district judge's sentence was improperly influenced by his misunderstanding that Mr. Clarke engaged in a

physical altercation when confronted by the victim and another witness, which the district judge opined was "a dangerous set of ingredients." JA 157. Indeed, if those "ingredients" appeared in the record, it might support such a harsh sentence, but the plain truth is that those "ingredients" are not supported by any evidence. Accordingly, pursuant to *Silks*, this court should reverse Mr. Clarke's conviction based on an abuse of discretion at sentencing.

The sentencing judge is accorded wide discretion in imposing a sentence. *Houk v. State*, 103 Nev. 659, 664, 747 P.2d 1376, 1379 (1987). This discretion enables the sentencing judge to consider a wide, largely unlimited variety of information to ensure that the punishment fits not only the crime, but also the individual defendant. *Norwood v. State*, 112 Nev. 438, 440, 915 P.2d 277, 278 (1996); *Martinez v. State*, 114 Nev. 735, 738, 961 P.2d 143, 145 (1998). This discretion, however, is not limitless. *Parrish v. State*, 116 Nev. 982, 989, 12 P.3d 953, 957 (2000).

"Sentencing by its very nature is a discretionary decision which requires the weighing of various factors and striking a fair accommodation between the defendant's need for rehabilitation and society's interest in safety and deterrence." *People v. Watkins*, 613 P.2d 633, 635-36 (Colo. 1980) (citations omitted). "[T]he discretion implicit in the sentencing decision is not an unrestricted discretion devoid of reason or principle. On the contrary, the

sentencing decision should reflect a rational selection from various sentencing alternatives in a manner consistent with the dominant aims of the sentencing process." *Id.* at 636.

As a matter of policy, this Court would do well to adopt the principles codified in 18 USC 3553(a). Known as the "parsimony clause," that statute provides that the courts must not impose a sentence greater than necessary to achieve the rule's stated purposes. Amongst others, those purposes are: (1) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; (2) to afford adequate deterrence to criminal conduct; (3) to protect the public from further crimes of the defendant; and (4) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner. 18 USC 3553(a)(2).

Here, the sentence is disproportionate to the seriousness of the offense, and cannot be seen to fulfill any stated purpose of NRS 205.060, particularly in light of the fact that the legislature has amended the statute so that it more fairly achieves the burglary statute's purposes.

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CONCLUSION

Based upon the foregoing, appellant Anthony Clarke respectfully requests that this Court reverse the conviction entered below.

Respectfully submitted this 13th day of November, 2020.

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CERTIFICATE OF COMPLIANCE

I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed with any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by the reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

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I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4)-(6) because the brief has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman 14. I further certify that this brief complies with the page or type-volume limitations because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more and does not exceed 30 pages.

Dated this 13th day of November, 2020.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 13th day of November 2020. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

Jennifer P. Noble, Chief Appellate Deputy
Washoe County District Attorney's Office

I further certify that I served a copy of this document by mailing a true and correct copy thereof, postage pre-paid, addressed to:

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